

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-7244

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
C.D.R. ENTERPRISES LTD., :

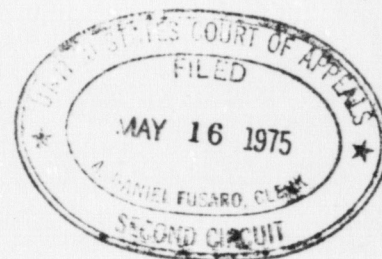
Plaintiff-Appellant, :

-against- :

HARRISON J. GOLDIN, individually, and :
as Comptroller of the City of New York, :

Defendant-Appellee, :
----- X

APPELLANT'S APPENDIX
----- X



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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

C.D.R. ENTERPRISES LTD. vs. HARRISON J. GOLDIN

74 W. 5397¹

MAC MAHON, J.

DATE	PROCEEDINGS	Date Order Judgment No.
11-74	Filed pliffs memorardum in support of motion for preliminary inj.	
10-74	Filed Complaint, Issued Summons	
10-74	Filed pliffs affdvt & Show Cause Order for preliminary injunction & the conveneing of a Three Judge court. Ret. 12-13-74.....	
	MAC MAHON, J.	
2-75	Filed summons & Marshal's return. Served: Harrison J. Goldin By Paulone Alena 12-20-74	
14-75	Filed Amendment of Complt. 1	
14-75	Filed Pltff's in opposition to deft's motion to dismiss.	
14-75	Filed Pltff's Memo. in opposition to deft's motion to dismiss.	NO6
22-75	Filed Stip & Order adjourning deft's motion to dismiss the complt to 1-31-75.	
29-75	Filed pliffs affdvt in support of motion for preliminary injunction.	
31-75	Filed deft's affdvt in opposition to pliffs motion for a prelim. inj. & in support of defts motion to dismiss.	
31-75	Filed deft's reply memo in support of motion to dismiss.	
10-75	Filed Pltff's Affdvt. dated. 2-10-75. Re: wages to Workers.	
20-75	Filed defts affdvt in opposition to pliffs motion for a prelim- inary injunction, & in support of defts motion to dismiss.	
14-75	Filed defts affdvt in opposition to pliffs application for prelim. inj & conveneing og a three judge court.	
14-75	Filed defts memo of law in opposition to prelim. inj. & three- judge court.	
14-75	Filed Memo-End. & Order on show cause order of 12-10-74. Motion denied. See opinion of this date.....MAC MAHON, J m/n	
14-75	Filed Memo-End. & Order on motion of 1-2-75. Motion granted. See opinion of this date.....MAC MAHON, J m/n	
14-75	Filed Memorandum #42246. Pltiffs motion for a preliminary injunction & the convening of a three-judge court is denied. Deft's cross-motion to dismiss the complt is granted, & we dismiss the amended complt sua sponte. So Ordered, MAC MAHON, J m/n	
14-75	Filed Pltff's Notice of Appeal to USCA...from an order entered on 4-14-75... dismissing the complt. Notice mailed to. W.B. Richland. Corp. Counsel, City of of N.Y. on 4-22-75.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
C.D.R. ENTERPRISES LTD., :

Plaintiff, :

vs. :

74 Civil 5397 - LFM

HARRISON J. GOLDEN, individually, and :
as Comptroller of the City of New :
York, :

NOTICE OF APPEAL
TO COURT OF APPEALS

Defendant. :
----- x

Notice is hereby given that C.D.R. ENTERPRISES LTD., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered on the docket on April 14, 1975, which dismissed the complaint, and denied plaintiff's motions for a preliminary injunction, and to convene a three-judge court to determine the constitutionality of section 220-b(2) of the New York Labor Law.

Dated: April 21, 1975.

Morris Weissberg
MORRIS WEISSBERG
Attorney for Plaintiff-Appellant
15 Park Row
New York, N.Y. 10038
(212) 964 0492

To:
Hon. W. Bernard Richland
Corporation Counsel
Attorney for Defendant-Appellee
Municipal Building
New York, N.Y. 10007

Clerk
U.S. District Court

ORDER APPEALED FROM

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
C.D.R. ENTERPRISES LTD., :
Plaintiff, :
-against- :
HARRISON J. GOLDIN, individually, :
and as Comptroller of the City :
of New York, :
Defendant. :
-----X

#42246

74 Civ. 5397-LFM

MEMORANDUM

APR 14 1 36 PM '75
S.D. OF N.Y.

MacMAHON, District Judge.

This is a civil rights action by C.D.R. Enterprises Ltd. ("C.D.R."), under 42 U.S.C. § 1983, for (1) a declaratory judgment that enforcement of § 220-b(2) of the New York Labor Law (McKinney Supp. 1975) by defendant denies due process and equal protection, and (2) a permanent injunction restraining further enforcement of that statute. Plaintiff now moves for a preliminary injunction, pursuant to Rule 65, Fed.R.Civ.P., and for the convening of a three-judge court, pursuant to 28 U.S.C. §§ 2282 and 2284. Defendant cross-moves to dismiss the complaint, pursuant to Rule 12(b), Fed.R.Civ.P., for lack of jurisdiction over the subject matter.

MICROFILM

APR 14 1975

Plaintiff, a painting contractor, entered into several contracts with the City of New York for painting its buildings. Each contract incorporated a provision of N.Y. Labor Law § 220-b(2), requiring an employer to pay the prevailing rate of wages to its employees working on public projects. The cited section of the statute further provides that when employees make formal complaints that they are not being paid the prevailing wage, the financial officer in charge can withhold the disputed wages from payment under the contract pending the outcome of an investigation and hearing by the financial officer. The financial officer has the adjunct power during an investigation and hearing to issue subpoenas, administer oaths and examine witnesses. Once the financial officer renders his decision, the employer has the right to bring an Article 78 proceeding under the New York Civil Practice Law and Rules to review the decision.

On July 22, 1974, several of plaintiff's employees working on the city projects under the contracts reported to the Comptroller of the City of New York, the financial officer in charge, that C.D.R. was not paying them the prevailing rate of wages. After an investigation, defendant Comptroller found that there was evidence that C.D.R. had underpaid its employees by \$10,207.39, and

on November 7, 1974 he stopped payment to C.D.R. in that
amount pending a hearing and determination of the dispute. ¹

During a hearing on December 6, 1974, the hearing officer of the Comptroller's office requested C.D.R. to produce records of wage payments which were the subject of the controversy in order to assist him in his determination. C.D.R., however, refused to produce the records and the Comptroller has, therefore, been unable to render a final decision in the matter.

Plaintiff contends that its right to procedural due process is being denied because § 220-b(2) does not provide the employer with the alternative of receiving the money due under the contracts and posting a surety bond to cover the disputed wages pending a determination of the controversy. Plaintiff also claims to suffer irreparable harm because § 220-b(2) deprives it of money needed to pay operating expenses and destroys its credit. In an amended complaint, plaintiff alleges that § 220-b(2) violates its equal protection under the law.

We cannot consider defendant's Rule 12(b) motion if a three-judge court is appropriate. ² We, therefore, turn first to plaintiff's application for that

relief under 28 U.S.C. § 2281.

Plaintiff attacks the constitutionality of a state statute and seeks to enjoin its enforcement. A three-judge court is, therefore, appropriate if plaintiff³ raises a substantial constitutional question.

In Goosby v. Osser, 409 U.S. 512 (1973), the Supreme Court recently outlined the standard for determining the substantiality of a constitutional claim. "A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 409 U.S. at 518.

In Bourjois, Inc. v. Chapman, 301 U.S. 183, 189 (1937), the Supreme Court was faced with a similar due process claim. There, plaintiff challenged as violative of due process a Maine statute which required the registration of cosmetic preparations by manufacturers or proprietors and empowered a state agency to issue or deny, under described standards, certificates of registration of such preparations. The Court concluded that the Constitution did not require that "there must be a hearing

of the applicant before the board may exercise a judgment under the circumstances and of the character here involved" and that "the requirement of due process of law is amply safeguarded by § 2 of the statute" providing for judicial review.

The established facts of the present action are that the hearings concerning whether plaintiff paid the prevailing rate of wages have not been completed due to plaintiff's refusal to supply the hearing officer with records of its wage payments. Once plaintiff supplies those records, the Comptroller will be able to render his decision. Plaintiff will then be entitled to proceed in the state courts for judicial review of the Comptroller's decision.

In F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), the Supreme Court stated that a state statute violates equal protection when it grants to some what it denies to others, unless the deprivation is suffered as the result of the state's placing persons into different classes and such classification is reasonable.

Plaintiff has utterly failed to show that § 220-b(2) grants something to other employers engaged in

public contracts that it denies to plaintiff. In addition, construing plaintiff's claim to mean that the withholding procedure of § 220-b(2) denies the class of employers engaged in public contracts equal protection, vis-a-vis employers not engaged in such contracts, we conclude that this classification is reasonable as it helps effectuate the public policy of New York that employees engaged in public projects be paid the prevailing rate of wages.

We conclude, therefore, that Bourjois, Inc. v. Chapman, supra, and F.S. Royster Guano Co. v. Virginia, supra, inescapably render C.D.R.'s attack on § 220-b(2) frivolous and insubstantial, thus precluding the convening of a three-judge court.

Since it is essential to jurisdiction under 42 U.S.C. § 1983 that a substantial federal question be presented, the complaint and amended complaint must be dismissed for lack of subject matter jurisdiction.⁴

Accordingly, plaintiff's motion for a preliminary injunction and for the convening of a three-judge court is denied. Defendant's cross-motion to dismiss the complaint is granted, and we dismiss the

ORDER APPEALED FROM

9

amended complaint sua sp.

So ordered.

Dated: New York, N. Y.

April 14, 1975

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

C.D.R. Enterprises Ltd. v. Goldin

74 Civ. 5397-LFM

FOOTNOTES

1

On January 3, 1975, the Comptroller stopped payment on an additional \$4,601.70, bringing the total amount subject to the stop payment order to \$14,809.09.

2

Idlewild Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

3

Idlewild Liquor Corp. v. Epstein, supra.

4

Hagans v. Lavine, 415 U.S. 528 (1974); Ex parte Poresky, 290 U.S. 30 (1933); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972).

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court at Room 1305 of the United States Courthouse, Foley Square New York, on the 24th day of January, 1975, at 2:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard for an order pursuant to Fed. R. Civ. P. 12(b)(1) & (6) dismissing plaintiff's complaint, on the grounds that this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief can be granted.

Dated: New York, N.Y.
January 2, 1975

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendant

By: Gary L. McMinimee
GARY L. McMINIMEE

To:
Merris Weissberg, Esq.
15 Park Row
New York, N.Y. 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
C.D.R. ENTERPRISES LTD.,

Plaintiff,

-against-

HARRISON J. GOLDIN, individually, and
as Comptroller of the City of New York,

Defendant.
----- X

: CIVIL ACTION

: FILE NO.

: TRIAL BY JURY DEMAND

For its Complaint, the plaintiff respectfully alleges:

1. This action is brought to secure injunctive relief from defendant's violations of plaintiff's rights under section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act, 42 U.S.C. section 1983. Jurisdiction of this Court is based upon 28 U.S.C. sections 1331 and 1343(3) and 1343(4). The amount in controversy, exclusive of interest and costs, exceeds ten thousand (\$10,000.00) dollars. The defendant maintains his principal office in, and he transacts business in the Southern District of New York.

2. Defendant, Harrison J. Goldin, is the Comptroller of the City of New York, and, as such, he is a "fiscal officer", who is authorized by section 220-b(2) of the Labor Law, upon his own initiative, or upon a written complaint alleging unpaid wages or supplements due for labor performed on a contract for a public improvement, to:

" *** notify the financial officer of the civil division interested, who shall withhold from any payment on account thereof, due the contractor or subcontractor executing said public improvement, sufficient moneys to satisfy said

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CITY OF NEW YORK
DEC 11 AM 9:51
OFFICE OF CORPORATION COUNCIL

wages, and supplements, pending a final determination. The fiscal officer shall then cause an investigation to be made to determine whether any amounts are due to the laborers, workmen or mechanics, or on their respective behalves, on such public improvement *** and shall order a hearing thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint *** such person complained against shall have an opportunity to be heard *** . The fiscal officer shall determine the issues *** and shall make and file an order in his office stating such determination and forthwith serve a copy of such order *** upon *** the parties to such proceedings *** . Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of the fiscal officer. In the event that such a proceeding for review is instituted, moneys sufficient to satisfy the claim shall be set aside by the financial officer interested, subject to the order of the court."

3. Plaintiff is a corporation, organized and existing under the laws of the State of New York, whose office is at 160 Baldwin Road, Hempstead, New York. Plaintiff is in business as a painting contractor, doing interior and exterior painting of buildings for departments and agencies of the Federal, New York State and New York City governments, as well as other local governments, and also contract painting work for private owners and contractors.

4. Plaintiff is now performing work as a painting contractor for several departments and agencies of the City of New York, including its Board of Education; and money is now due to the plaintiff for its work upon the said contracts.

FIRST CLAIM FOR RELIEF:

5. This claim for relief is based upon section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. On or about October 11, 1974, the defendant caused to be served upon the plaintiff a written notice of a hearing to be held in defendant's office on October 31, 1974, upon allegations that the plaintiff violated section 220 of the New York Labor Law by failing to pay to its employees prevailing rates of wages and supplements of \$2,188.54, for work upon public improvement contracts, as alleged in a statement annexed to said notice, Exhibit 1, annexed.

7. Plaintiff's secretary came to defendant's office on October 31, 1974, with plaintiff's records, but no hearing was held, because the defendant adjourned the said hearing without notice to plaintiff.

8. On or about November 4, 1974, the defendant caused to be served upon the plaintiff a written notice of a hearing to be held in defendant's office on November 13, 1974, upon allegations that the plaintiff violated section 220 of the New York Labor Law by failing to pay to its employees prevailing rates of wages and supplements of \$26,510.50, as alleged in a statement annexed to said notice. A copy of said notice and statement is annexed hereto as Exhibit 2, and made a part hereof.

9. The aforesaid allegations in the said statements annexed to the said notices of hearing are contrary to the facts and untrue.

10. On November 7, 1974, the defendant, by his employee, Howard E. Eabbuen, Assistant to the Comptroller of the City of New York, issued a "Stop Payment Order", whereby he directed that pending

the hearing and determination of the aforesaid allegations, the sum of \$10,207.39 shall be withheld from the money due to the plaintiff for work it performed on public improvement contracts with departments and agencies of the City of New York. A copy of the said "Stop Payment Order" is annexed hereto as Exhibit 3, and made a part hereof.

11. Oral testimony and documentary evidence was presented at hearings upon the aforesaid allegations held before the defendant's designated hearing officer, Howard E. Babbush, on November 13, 1974, and on December 3 and 6, 1974.

12. On December 3, 1974, the plaintiff asked the said Howard E. Babbush to release the aforesaid \$10,207.39 withheld pursuant to the said "Stop Payment Order", and to accept in place thereof a surety company bond to secure payment of any money which may be determined to be due to plaintiff's workers for work upon public improvement contracts with departments and agencies of the City of New York, but the said Howard E. Babbush declined to do so, and he said that he had no power to grant this request, because it was a matter of policy for the defendant to decide. Thereupon, plaintiff's lawyer made a similar written request in a letter to the defendant, dated December 3, 1974, a copy of which is annexed hereto as Exhibit 4, and made a part hereof. To date, the defendant has not replied to that letter.

13. Section 21 of the New York Lien Law provides that a laborer employed upon a public improvement contract may file a mechanic's lien for unpaid wages; and that a contractor who disputes a claim for unpaid wages for which a mechanic's lien was filed, may release such lien by posting a surety company bond to secure payment of any wages

which may be determined to be due to such a laborer in an action to foreclose such lien. In this case, no laborer in plaintiff's employ has filed a mechanic's lien alleging that wages are due him for work on a public improvement contract. Consequently, it is not possible for plaintiff to file a bond to release such a lien, which plaintiff would be able to do if such a lien had been filed.

14. At the end of a hearing session on December 6, 1974, the said Howard E. Babbush canceled a hearing session which was previously scheduled for December 13, 1974, and he adjourned the hearings without date.

15. The aforesaid "Stop Payment Order" has been in effect since November 7, 1974. Even if the hearings should be resumed, after their adjournment without date on December 6, 1974, it will still take a long time before such hearings are concluded, and a determination is made. Defendant's hearing officer does not hold hearings on consecutive days, one after the other, but, instead, he usually adjourns for about two weeks or more, from one hearing session to another.

16. The defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the aforesaid "Stop Payment Order", and to accept a surety company bond in place thereof, as aforesaid, has caused, and it will continue to cause irreparable harm to plaintiff for a long time in these times of high interest rates and scarcity of money for loans to business, by depriving it of the money it needs to meet its payrolls and to pay its operating expenses, and by destroying its financial credit and ability to borrow money, because the said "Stop Payment Order" caused great concern to plaintiff's creditors, and made them unwilling to lend more money to plaintiff, and they are

demanding re-payment of their present loans to plaintiff. Unless the plaintiff is allowed to post a bond and thereby release the money due to it for work it performed, the plaintiff will not survive until the conclusion of the hearing, and it will be forced to go out of business, because it will not have money to pay its workers for their work, and to pay its bills for materials, equipment, and services.

17. The public purpose to secure to workers on public improvement contracts payment of wages for their work would be fully accomplished by releasing the aforesaid \$10,207.39, withheld pursuant to the said "Stop Payment Order", and the replacement thereof by a surety company bond.

18. The absence of a provision in section 220-b(2) of the New York Labor Law that a contractor may file a surety company bond and thereby release the money which that statute authorized to be withheld to pay any wages which may be determined to be due to laborers for their work upon a public improvement contract, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and for that reason section 220-b(2) of the New York Labor Law is unconstitutional and void.

19. By reason of the foregoing, the defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and it was unconstitutional and void.

SECOND CLAIM FOR RELIEF:

20. This claim for relief is based upon the Civil Rights Act, 42 U.S.C. section 1983.

21. Plaintiff herein repeats each and every allegation in paragraphs 1 through 18 hereof, as if herein set forth in full.

22. By reason of the foregoing, the defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the aforesaid "Stop Payment Order", and to accept a surety company bond in place thereof, gave the plaintiff a cause of action under the Civil Rights Act, 42 U.S.C. section 1983, for redress of deprivation of a right under the Constitution of the United States, and to recover damages caused thereby.

23. Plaintiff sustained \$10,000 damages by defendant's refusal to release the said \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof.

Wherefore, the plaintiff demands judgment:

1. Adjudging and declaring that the absence of a provision in section 220-b(2) of the New York Labor Law that a contractor may file a surety company bond and thereby release the money which that statute authorized to be withheld to pay any wages which may be determined to be due to laborers for their work upon a public improvement contract, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and for that reason section 220-b(2) of the New York Labor Law is unconstitutional and void.

2. Adjudging and declaring that the defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and it was unconstitutional and void.

3. Adjudging and declaring that the defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof, gave the plaintiff a cause of action under the Civil Rights Act, 42 U.S.C. section 1983, for redress of deprivation of a right under the Constitution of the United States, and to recover damages caused thereby.

4. Directing the defendant immediately to release the sum of \$10,207.39, which he directed to be withheld by his aforesaid "Stop Payment Order", and to accept a surety company bond in place thereof.

5. Granting a money judgment in favor of plaintiff against defendant for plaintiff's counsel fees herein and for the damages plaintiff sustained by defendant's refusal to release the said \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof.

6. For such other, further or different relief as may be just and proper.

Morris Weissberg
MORRIS WEISSEERG
Attorney for Plaintiff
15 Park Row
New York, N.Y. 10038
(212) 964 0492

EXHIBIT 1, ANNEXED TO COMPLAINT
read in support of motion to
dismiss complaint

20

Before The Comptroller Of The City Of New York

In The Matter of the Complaint
against

Iannelli Construction Co.

C.D.R. Enterprises Ltd.

K.M.A. Construction Corp.

for violation of Labor Law 220 et. seq.

Office of the Comptroller
City of New York
Date: 10/11/74
Exhibit 1
Notice of Hearing
and
Statement (Complaint)

PLEASE TAKE NOTICE that pursuant to Labor Law Section 220 et. seq., a hearing, under oath, will be held in the Office of the Comptroller, Municipal Building, New York, N.Y., 10007, Room 638 on the 31st day Oct. 1974 at 10 O'clock in the forenoon ~~on the 31st day of that day.~~ You may be represented by Counsel at such hearing.

The purpose of the hearing is to take evidence and testimony as to whether or not you violated Labor Law Section 220, et. seq., as alleged in the annexed statement. (~~xxxxxx~~)

PLEASE TAKE FURTHER NOTICE that you are required to produce at the hearing all books, contracts, papers, documents and other evidence relating to the wages and supplements paid on City or ~~xxxxxxxxxxxxxxxxxxxx~~ public works performed by you within three years prior to the date of this notice.

PLEASE TAKE FURTHER NOTICE that upon your failure to appear, testimony will be heard, evidence will be taken and a determination will be made based thereon.

PLEASE TAKE FURTHER NOTICE that after the hearings in this matter are concluded the Comptroller will enter an order as is required by Labor Law Section 220 et. seq.

Yours etc.,

HARRISON J. GOLDIN

Comptroller

Dated: 10/11/74
New York, NY

EXHIBIT 1

The annexed statement (~~complaint~~) alleges that
Iannelli Const., C.D.R. Ent., KMA Const. Corp. violated Labor
Law Section 220 et. seq., by failing to pay its employees
the prevailing rate of wages, supplemental benefits and
prevailing practices in the total sum of \$2188.54,
~~and that~~
~~neglected, and refused to maintain the true ratio of~~
~~approximately 40% as required by law.~~

For the period March 2, 1974 to April 3, 1974.

Jose Tases	\$ 828.80	405. -
Pedro, Perez	687.52	-
Isodoro Contejou	443.74	- 450. -
Pedro Sestyo	228.48	-
Total	<u>\$2188.54</u>	

~~EXHIBIT 2~~ EXHIBIT 2 annexed to complaint, read in
support of motion
to dismiss complaint, ~~EXHIBIT 2~~

before The Comptroller Of The City Of New York

In the Matter of the Complaint
against

Iannelli Construction Co.
C.D.R. Enterprises Ltd.
K.M.A. Construction Corp.
John Durandes

Notice of Hearing
and
Statement (~~Comptroller~~)

for violation of Labor Law 220 et. seq.

PLEASE TAKE NOTICE that pursuant to Labor Law Section 220 et. seq., a hearing, under oath, will be held in the Office of the Comptroller, Municipal Building, New York, N.Y., 10007, Room 638 on the 13th day Nov. 1974 at 10 O'clock in the forenoon ~~xxxxafternoon~~ of that day. You may be represented by Counsel at such hearing.

The purpose of the hearing is to take evidence and testimony as to whether or not you violated Labor Law Section 220, et. seq., as alleged in the annexed statement. (~~complaint~~)

• PLEASE TAKE FURTHER NOTICE that you are required to produce at the hearing all books, contracts, papers, documents and other evidence relating to the wages and supplements paid on City or ~~xxxxxxxxxxxxxxxxxxxx~~ public works performed by you within three years prior to the date of this notice.

PLEASE TAKE FURTHER NOTICE that upon your failure to appear, testimony will be heard, evidence will be taken and a determination will be made based thereon.

PLEASE TAKE FURTHER NOTICE that after the hearings in the matter are concluded the Comptroller will enter an order as required by Labor Law Section 220 et. seq.

Yours etc.,

HARRISON J. BELLI

Comptroller

Dated: 11/4/74
New York, NY

EXHIBIT 2

The annexed statement (~~complaint~~) alleges that
annelli Const. KMA Const. CDR Ltd. & John Durand violated Labor
Law Section 220 et. seq., by failing to pay its employees
the prevailing rate of wages, supplemental benefits and
prevailing practices in the total sum of \$26,510.50.
~~and that~~ ~~xx~~ ~~failed,~~
~~neglected, and refused to maintain the true ratio of~~
~~apprentices to journeymen as required by law.~~

For the period May 5, 1973 to July 26, 1974.

Jose Tajas	\$11,701.41
Pedro Perez	4,636.70
Daniel Vasquez	10,172.39
Total	<u>\$26,510.50</u>

OFFICE OF THE COMPTROLLER

Mr. Jerry R. Masi
to Chief, Bureau of Audit
FROM Howard E. Babbush
Ass't to the Comptroller
SUBJECT Stop Payment Order

Nov. 7, 1974

C.D.R. Enterprises Ltd	\$10,207.39
------------------------	-------------

Please be advised, that pursuant to Section 220 of the New York State Labor Law, a hearing is pending before this office to determine whether or not subject contractor is in violation thereof.

Accordingly, it is requested of your office to withhold these amounts in payment to ~~this~~ these contractors pending a final determination.

Howard E. Babbush
Ass't to the Comptroller

EXHIBIT 3

MORRIS WEISSBERG

15 PARK ROW
NEW YORK, N.Y. 10038

ROBERT J. KRENGEL

WO 4-0492

December 3, 1974

Hon. Harrison J. Goldin,
Comptroller
Municipal Building
New York, N.Y. 10007

Dear Mr. Goldin:

Re: Prevailing Wage Complaints against
C.D.R. ENTERPRISES LTD.
K.M.A. CONSTRUCTION CORP.

On November 13, 1974, a first hearing was held upon complaints that the above-named firms failed to pay prevailing wages to painters in their employ who allegedly worked upon public work contracts. An adjournment was taken to December 3, 1974, when a second hearing was held, lasting a whole day, with an adjournment taken to December 6, 1974, and an alternate adjournment date of December 13, 1974.

Following the first hearing on November 13, 1974, your office stopped payment of \$10,000 due to C.D.R. ENTERPRISES LTD. on current public work contracts other than those involved in the said complaints of non payment of prevailing wages.

Since almost three weeks have now elapsed, and it appears that it will take substantially more time before the hearings are completed and a determination is made with respect to such complaints, I respectfully ask that you allow the above-named firms, or either of them, to post a bond to secure payment of any sums eventually determined to be owed by such firms as a balance of prevailing wages, thereby releasing the money now being held for payment to them for their current work on other public work contracts. Withholding of such money is a great economic hardship on these firms in these times of tight money and high interest rates. Unless these firms are allowed to post a bond and thus release the money due them for work they performed, they may be forced out of business. I presented this request to Mr. Babbush, the hearing officer, who said he had no power to grant this request.

Will you please review this matter and advise me of your decision.

Very truly yours,

MW:c

Morris Weissberg
MORRIS WEISSBERG

EXHIBIT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
C.D.R. ENTERPRISES LTD., :

Plaintiff, :

JUDGE MAC MAHON

-against- :

74 Civil 5397

HARMISON J. GOLDIN, individually, and as:
Comptroller of the City of New York,

Defendant. :

AMENDMENT OF
COMPLAINT
----- X

Pursuant to Rule 15(a) of the Federal Rules of Civil
Procedure, the plaintiff hereby amends paragraphs 18, 19, and 21
of its complaint herein, to read as follows:

18. The absence of a provision in section 220-b(2) of the
New York Labor Law that a contractor may file a surety company
bond and thereby release the money which that statute authorized
to be withheld to pay any wages which may be determined to be due
to laborers for their work upon a public improvement contract,
unconstitutionally deprived the plaintiff of its property without
due process of law, and denied to it the equal protection of the
laws, contrary to section 1 of the Fourteenth Amendment to the
Constitution of the United States, and for that reason section
220-b(2) of the New York Labor Law is unconstitutional and void.

19. By reason of the foregoing, the defendant's refusal to
release the aforesaid \$10,207.39, withheld pursuant to the said
"Stop Payment Order", and to accept a surety company bond in place
thereof, unconstitutionally deprived the plaintiff of its property
without due process of law, and denied to it the equal protection
of the laws, contrary to section 1 of the Fourteenth Amendment
to the Constitution of the United States, and it was

AMENDMENT OF COMPLAINT: read in support of motion to
dismiss complaint

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unconstitutional and void.

21. Plaintiff herein repeats each and every allegation in
paragraphs 1 through 19 hereof, as if herein set forth in full.

New York, N.Y.
January 13, 1975.

MORRIS WEISSBERG
Attorney for Plaintiff
15 Park Row
New York, N.Y. 10038
(212) 964 0492

To:

Hon. Adrian P. Burke
Corporation Counsel
Attorney for Defendant
Municipal Building
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C.D.R. ENTERPRISES LTD.,

Plaintiff,

-against-

HARRISON J. GOLDIN, individually, and as:
Comptroller of the City of New York,

Defendant.

: CIVIL ACTION

: FILE NO. 74 CIVIL 5997 LFM

:

ORDER TO SHOW CAUSE

: FOR PRELIMINARY INJUNCTION
AND CONVENING A 3-JUDGE
COURT

Upon reading and filing the annexed affidavit of Charles Di
Leo, sworn to on December 7, 1974, and the complaint in this action,
with the exhibits annexed thereto,

IT IS ORDERED THAT

Let the defendant, Harrison J. Goldin, individually, and as
Comptroller of the City of New York, show cause before a Judge of
this Court, in Room 706, United States Courthouse, Foley Square,
New York, New York, at 2:15 P. M., on December 13, 1974, or
as soon thereafter as counsel can be heard, why an order should not
be made, pursuant to Rule 65 of the Federal Rules of Civil Procedure,
granting to plaintiff a preliminary injunction, pending the final
determination of this action, restraining the defendant, Harrison J.
Goldin, individually, and as Comptroller of the City of New York, and
his agents, servants, and employees, from withholding from the
plaintiff the sum of \$10,207.39, which is due to the plaintiff for
its work upon public improvement contracts with departments and
agencies of the City of New York, provided that the plaintiff files a
surety company bond in that sum to secure payment of any part
thereof which may be determined to be due to persons whom the plain-
tiff employed upon such public improvement contracts; and why an

ORDER TO SHOW CAUSE, read in support of plaintiff's motion for preliminary injunction and 3-judge court

order should not be made, pursuant to 28 U.S.C. sections 2261 and 2284, directing that a statutory court of three judges shall be convened to hear and to decide plaintiff's application for a permanent injunction, restraining the defendant from withholding the plaintiff's said sum of \$10,207.39, provided that the plaintiff files a surety company bond in that sum to secure payment of any part thereof which may be determined to be due to persons whom the plaintiff employed upon the aforesaid public improvement contracts, upon the ground that section 220-b(2) of the New York Labor Law, violates section 1 of the Fourteenth Amendment to the Constitution of the United States and it is unconstitutional because it authorizes the withholding of such money, without providing for filing a surety company bond to replace the money so withheld, and to secure payment of any wages which may be determined to be due to persons employed upon such public improvement contracts, it is further Ordered that personal

Service of a copy of this order, with a copy of the papers upon which it was granted, made upon the defendant/^{or his attorney} on or before December 11th 1974, shall be good and sufficient service.

Dated: New York, New York
December 10th 1974.

LLOYD F. MAC MAHON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

C.D.R. ENTERPRISES LTD.,	:	CIVIL ACTION
Plaintiff,	:	FILE No.
-against-	:	
HARRISON J. GOLDIN, individually, and	:	
as Comptroller of the City of New York,	:	
Defendant.	:	AFFIDAVIT

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss

CHARLES D'ALEO being duly sworn, deposes and says: I am the Secretary of C.D.R. ENTERPRISES LTD., the plaintiff herein.

I make this affidavit in support of plaintiff's motion for a preliminary injunction, directing the defendant immediately to release the sum of \$10,207.39, which he directed to be withheld by a "Stop Payment Order", dated November 7, 1974, pending the hearing and determination of allegations that the plaintiff failed to pay prevailing wages and supplements to workers whom it employed upon public work contracts with departments and agencies of the City of New York, and to accept a surety company bond in place thereof.

I also make this affidavit in support of plaintiff's application, pursuant to 28 U.S.C. sections 2281 and 2284, to convene a statutory court of three judges, to hear and to decide plaintiff's application for a permanent injunction, restraining the defendant from withholding the said sum of \$10,207.39 which is due to the plaintiff for its work on the said public improvement contracts, and from refusing to accept a surety company bond in place thereof, upon the ground that the absence of a provision in section 220-b(2) of the

New York Labor Law that a contractor may file a surety company bond and thereby release the money which that statute authorized to be withheld to pay any wages which may be determined to be due to laborers for their work upon a public improvement contract, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and for that reason section 220-b(2) of the New York Labor Law is unconstitutional and void.

Plaintiff is in business as a painting contractor, doing interior and exterior painting of buildings for departments and agencies of the Federal, New York State and New York City governments, as well as other local governments, and also contract painting work for private owners and contractors.

Plaintiff is now performing work as a painting contractor for several departments and agencies of the City of New York, including its Board of Education; and money is now due to the plaintiff for its work upon the said contracts.

On or about October 11, 1974, the defendant caused to be served upon the plaintiff a written notice of a hearing to be held in defendant's office on October 31, 1974, upon allegations that the plaintiff violated section 220 of the New York Labor Law by failing to pay to its employees prevailing rates of wages and supplements of \$2,188.54, for work upon public improvement contracts, as alleged in a statement annexed to said notice (Complaint, Exhibit 1).

I came to defendant's office on October 31, 1974, with plain-

tiff's records, but no hearing was held, because the defendant adjourned the said hearing without notice to plaintiff.

On or about November 4, 1974, the defendant caused to be served upon the plaintiff another written notice of a hearing to be held in defendant's office on November 13, 1974, upon allegations that the plaintiff violated section 220 of the New York Labor Law by failing to pay to its employees prevailing rates of wages and supplements of \$26,510.50, for work upon public improvement contracts, as alleged in a statement annexed to said notice (Complaint, Exhibit 2).

The aforesaid allegations in the said statements are contrary to the facts and untrue.

On November 7, 1974, the defendant, by his employee, Howard E. Babbush, Assistant to the Comptroller of the City of New York, issued a "Stop Payment Order", whereby he directed that pending the hearing and determination of the aforesaid allegations, the sum of \$10,207.39 shall be withheld from the money due to the plaintiff for work it performed on public improvement contracts with departments and agencies of the City of New York (Complaint, Exhibit 3).

Oral testimony and documentary evidence was presented at hearings upon the aforesaid allegations, held before the defendant's designated hearing officer, Howard E. Babbush, on November 13, 1974, and on December 3 and 6, 1974.

On December 3, 1974, the plaintiff asked the said Howard E. Babbush to release the aforesaid \$10,207.39 withheld pursuant to the said "Stop Payment Order", and to accept in place thereof a surety company bond to secure payment of any money which may be determined to be due to plaintiff's workers for work upon public improvement

contracts with departments and agencies of the City of New York, but Mr. Babbush declined to do so, and he said that he had no power to grant this request, because it was a matter of policy for the defendant to decide. Thereupon, plaintiff's lawyer made a similar written request in a letter to the defendant, dated December 3, 1974 (Complaint, Exhibit 4). To date, the defendant has not replied to that letter.

Section 21 of the New York Lien Law provides that a laborer employed upon a public improvement contract may file a mechanic's lien for unpaid wages; and that a contractor who disputes a claim for unpaid wages for which a mechanic's lien was filed, may release such lien by posting a surety company bond to secure payment of any wages which may be determined to be due to such a laborer in an action to foreclose such lien. In this case, no laborer in plaintiff's employ has filed a mechanic's lien for unpaid wages on any such public improvement contract. Consequently, it is not possible for plaintiff to file a bond to release such a lien, which plaintiff would be able to do if such a lien had been filed.

At the end of a hearing session on December 6, 1974, Mr. Babbush canceled a hearing session which he previously scheduled for December 13, 1974, and he adjourned the hearings without date.

The aforesaid "Stop Payment Order" has been in effect since November 7, 1974. Even if the hearings should be resumed, after their adjournment without date on December 6, 1974, it will still take a long time before such hearings are concluded, and a determination is made. Mr. Babbush does not hold hearings on this matter on consecutive dates, one after the other, but, instead, he usually

adjourns for about two weeks or more, from one session to another

Defendant's refusal to release the aforesaid \$10,207.39, withheld pursuant to the aforesaid "Stop Payment Order", and to accept a surety company bond in place thereof, has caused, and it will continue to cause irreparable harm to plaintiff for a long time in these times of high interest rates and scarcity of money for loans to business, by depriving it of the money it needs to meet its payrolls and to pay its operating expenses, and by destroying its financial credit and ability to borrow money, because the said "Stop Payment Order" caused great concern to plaintiff's creditors, and made them unwilling to lend more money to plaintiff, and they are demanding re-payment of their present loans to plaintiff. Unless the plaintiff is allowed to post a bond and thereby release the money due to it for work it performed, the plaintiff will not survive until the conclusion of the hearing, and it will be forced to go out of business, because it will not have money to pay its workers for their work, and to pay its bills for materials, equipment, and services.

The public purpose to secure to workers on public improvement contracts payment of wages for their work would be fully accomplished by releasing the aforesaid \$10,207.39, withheld pursuant to the said "Stop Payment Order", and the replacement thereof by a surety company bond.

The absence of a provision in section 220-b(2) of the New York Labor Law that a contractor may file a surety company bond and thereby release the money which that statute authorized to be withheld to pay any wages which may be determined to be due to laborers for their

work upon a public improvement contract, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and for that reason section 220-b(2) of the New York Labor Law is unconstitutional and void.

For the foregoing reasons, the defendant's refusal to release the said \$10,207.39, withheld pursuant to the said "Stop Payment Order", and to accept a surety company bond in place thereof, unconstitutionally deprived the plaintiff of its property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, and it was unconstitutional and void.

Defendant's aforesaid refusal also gave the plaintiff a cause of action under the Civil Rights Law, 42 U.S.C. section 1983, for redress of deprivation of a right under the Constitution of the United States, and to recover damages caused thereby.

Plaintiff sustained \$10,000 damages caused by defendant's refusal to release the said \$10,207.39, and to accept a surety company bond in place thereof.


An order to show cause is requested herein, instead of the usual notice of motion, because the plaintiff is applying for the convening of a three judge court, pursuant to 28 U.S.C. sections 2281 and 2284, to hear and to decide plaintiff's application for a permanent injunction restraining the defendant from withholding the plaintiff's said sum of \$10,207.39, upon the ground that section 220-b(2) of the New York Labor Law is unconstitutional for the aforesaid reasons; and because the plaintiff wishes to bring on for

hearing as soon as possible its motion for a preliminary
injunction herein.


No temporary restraining order is requested herein.

Notice of this application has been given to the Attorney
General of the State of New York, by giving him a copy of the papers
submitted herein.

No previous application has been made for the annexed
order to show cause.


CHARLES D'ALEO

Sworn to before me this
7th day of December 1974



Notary Public for the State of New York
My Commission Expires 12/31/75

Notary Public for the State of New York
My Commission Expires 12/31/75

BENEDICT P. SANTERAMO, being duly sworn, deposes and says:

1. I am the Chief of Labor Law Enforcement of the Comptroller's Office, City of New York.

2. I make this affidavit, based upon facts known by me to be true, the books and records of the Office of the Comptroller and information supplied to me by other members of the Office, in opposition to Plaintiff's application for a preliminary injunction and the convening of a three-judge court.

3. On July 22, 1974, several employees of the plaintiff, C.D.R. Enterprises Ltd. (hereinafter "CDR") came to the Office of the Comptroller and made statements which indicated that they had been employed by CDR to do painting work at P.S. 100 and P.S. 110 in Brooklyn and that this work was done by CDR pursuant to Contract Nos. 706084 and 706405 between CDR and The Board of Education of the City of New York. Their statements further indicated that they had not been paid the "prevailing rate of wages" as required by New York Labor Law Section 220 and Article 63 of the respective contracts, a copy of which is appended hereto as Exhibit A and made a part hereof.

4. Pursuant to the practice of the Office, a claim examiner in the Labor Law Enforcement Division of the Comptroller's Office, Thomas Nedell, was assigned to investigate the validity of the information supplied by the employees.

5. On July 24, 1974, Mr. Nedell visited both schools to gather information. This included personal interviews with the Custodians at the schools and a review of the log books kept by them. These logs contain information with respect to who and

when persons have performed work at the schools. Subsequently, a subpoena was served upon CDR demanding that it produce all books, records and documents, relating to its contracts with the Board of Education. A payroll book was received in the Office on September 12, 1974. In view of this new information, Mr. Nodell, in furtherance of his investigation, returned to the schools on September 20, 1974. Subsequently, Mr. Nodell, based upon his investigation prepared an audit which coupled with the other information that the Office had gathered indicated that CDR had violated Section 220 and accordingly breached its contracts with the Board of Education in that it had not paid the "prevailing rate of wages."

6. On October 11, 1974, CDR was formally charged with having violated Labor Law Section 220 et seq. A copy of the Notice sent to CDR is attached as Exhibit 1 to Plaintiff's complaint. The hearing was scheduled for October 31, 1974. However, due to new information received in the interim, the Notice was withdrawn.

7. The October 11, 1974 Notice was replaced on November 4, 1974 with a Notice charging that CDR had underpaid its employees in an amount of \$26,510.50 for the period May 5, 1973 to July 26, 1974. This underpayment was in connection with the above mentioned contracts and also on contracts which CDR was as subcontractor. A copy of the Notice of these charges is attached to plaintiff's complaint as Exhibit 2. A hearing date of November 13, 1974 was ordered.

8. On November 7, 1974, the Office pursuant to Section

220 of the Labor Law ordered payments stopped to CDR in the amount of \$10,207.39. The stop order was limited to \$10,207.39 since this was the amount determined by the Department to have been underpaid in connection with the two above mentioned contracts on which CDR was the general contractor. This stop order has resulted in withholding payments on three other contracts which CDR has with the City. On these three contracts and the two above mentioned contracts CDR has already received payments from the City of nearly \$93,000.

9. Some evidence was taken at the hearing on November 13, 1974, however, since Mr. Morris Weissberg, Esq., who represented CDR at the hearing indicated that he had only been recently retained and was not fully familiar with the case, the hearing was adjourned to December 3, 1974. A full day of hearings was held on that date. At the end of the day. Mr. Babbush, the hearing officer, inquired about the time Mr. Schwerin would need to complete the case for the Comptroller. He indicated about a half a day. Mr. Weissberg indicated that his defense would require about one or two days. Mr. Babbush suggested that the hearing continue on December 4, 1974, the next day. However, that was inconvenient to the attorneys. December 6, 1974 was then suggested, but Mr. Weissberg was unavailable for the morning on that day. It was finally agreed that the hearing would continue on the afternoon of December 6, 1974. Moreover, since it was obvious that one afternoon would not be sufficient to complete the proceeding, it was suggested that December 12, 1974 also be scheduled as a hearing date. That

date, however, was again inconvenient to the defendants and December 13, 1974 was scheduled.

10. On December 6, 1974, evidence was again taken. During the proceedings, Mr. Schwerin requested to see certain books which Mr. Weissberg had with him. He refused and Mr. Babbush ordered production. When Mr. Weissberg continued to refuse, Mr. Babbush directed Mr. Schwerin to seek an order in the New York Supreme Court compelling production. As the result, the hearing scheduled for December 13, 1974 has been adjourned pending the outcome of the proceeding to secure the above mentioned material. As indicated by Exhibits B attached hereto and made part hereof, Mr. Weissberg has been so advised.

11. I must take specific exception to the statement made on pages 4 and extending over to page 5 of Mr. D'Aleo's affidavit to the effect that Mr. Babbush does not handle hearings in an expeditious fashion. I have been involved in numerous proceedings where Mr. Babbush has been the hearing officer, and I have not perceived any policy of not holding hearings on consecutive dates or routinely ordering two week adjournments. Moreover, it is difficult to understand Mr. D'Aleo's familiarity with Mr. Babbush's practices.

12. On December 3, 1974, Mr. Weissberg requested that his client be permitted to file a surety bond for the \$10,207.39 withheld pursuant to the stop payment order and that the money be released to him. Mr. Babbush indicated that he was without power to honor such a request.

BENEDICT P. SANTERAMO

Sworn to before me this
13 day of December 1974

EXHIBIT A annexed to affidavit of Benedict P.
Santeramo, read in opposition to plaintiff's motion

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Unlawful
provision: a
be stricken

Art. 61. If this contract contains any unlawful provision, not an essential part of the general structure of the contract and which shall appear not to have been a controlling or very material inducement to the making thereof, the same shall be deemed of no effect and shall, upon the application of either party, be stricken from the contract without affecting the binding force of the contract as it shall remain after omitting such provision.

Workmen
Compensation

Art. 62. If the employees engaged on the Work to be performed under this Contract are required to be insured by the provisions of the Workmen's compensation Law, and acts amendatory thereof, this Contract shall be void and of no effect unless the person, firm or corporation making or performing the same shall secure compensation for the benefit of, and keep insured during the life of said Contract, such employees, in compliance with the provisions of said law.

Labor Law

Art. 63. The Contractor must strictly comply with all applicable provisions of the New York State Labor Law, including amendments thereto, and the provisions of Section 343-9.0 of the New York City Administrative Code, as amended.

Hours of
Work

No laborer, workman or mechanic in the employ of the Contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by this contract shall be permitted or required to work more than eight hours in any one calendar day, or more than five days in any one week, except in cases of extraordinary emergency including fire, flood or danger to life or property, or in case of national emergency when so proclaimed by the President of the United States of America, or in any other case provided by law.

In situations in which there are not sufficient laborers, workmen and mechanics who may be employed to carry on expeditiously the work contemplated by this contract as a result of such restrictions upon the number of hours and days of labor, and the immediate commencement or prosecution or completion without undue delay of the work is necessary for the preservation of the contract site and/or for the protection of the life and limb of the persons using the same, such laborers, workmen and mechanics shall be permitted or required to work more than eight hours in any one calendar day; or five days in any one week; provided, however, that upon application of any contractor the Executive Director shall have first certified to the Industrial Commissioner of the State of New York that such public work is of an important nature and that a delay in carrying it to completion would result in serious disadvantage to the public; and provided, further, that such Industrial Commissioner shall have determined that such an emergency does in fact exist as provided in Subdivision two of Section 220 of the Labor Law.

Failure of the Executive Director to make such a certification to the Industrial Commissioner shall not entitle the contractor to damages for delay or for any cause whatsoever.

Working
Conditions

No part of the work, labor or services shall be performed or rendered by the Contractor in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary and factory inspection laws of the state in which the work is to be performed shall be prima facie evidence of compliance with this paragraph.

Prevailing
Rate
of Wages

The wages to be paid for a legal day's work to laborers, workmen or mechanics employed upon the work contemplated by this contract or upon any materials to be used thereon shall not be less than the "prevailing rate of wage" as defined in Section 220 of the Labor Law, and as fixed by the Comptroller in the attached Schedule of Wage Rates and in updated schedules thereof. The prevailing wage rates and supplemental benefits to be paid are those in effect at the time the work is being performed.

Exhibit A

**EXHIBIT A annexed to affidavit of Benedict P.
Santeramo, read in opposition to plaintiff's motion**

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In accordance with the provisions of Section 343-9.0 of the New York City Administrative Code, as amended:

Except for employees whose wage is required to be fixed pursuant to Section 220 of the Labor Law, all persons employed by the Contractor and any subcontractor in the manufacture or furnishing of the supplies, materials, or equipment, or the furnishing of work, labor or services, used in the performance of this contract, shall be paid, without subsequent deduction or rebate unless expressly authorized by law, not less than the sum of two dollars and fifty cents (\$2.50) an hour.

1. For any breach or violation of the paragraphs on working conditions and minimum wages above, the party responsible therefor shall be liable to the Board for liquidated damages, which may be withheld from any amounts due on any contract with the Board of such party responsible, or may be recovered in suits brought by the Corporation Counsel in the name of the Board, in addition to damage for any other breach of this contract, a sum equal to the amount of any underpayment of wages due to any employee engaged in the performance of this contract. In addition, the Executive Director shall have the right to cancel this contract and enter into other contracts for the completion of the original contract, with or without public letting, and the original contractor shall be liable for any additional cost. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages hereunder, shall be held in a special deposit account and shall be paid without interest, on order of the Commissioner of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth herein and on whose account such sums were withheld or recovered, provided that no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the Board.

In the event of any breach or violation of any of the foregoing, and in addition to the provisions herein, no contracts shall be awarded to the Contractor or subcontractor, as the case may be, or to any firm, corporation, partnership or association in which the Contractor or subcontractor has a controlling interest until three years have elapsed from the date of such breach.

2. The contractor and his subcontractors shall within ten (10) days after mailing of a Notice of Award or written order, post in prominent and conspicuous places in each and every plant, factory, building and structure where employees of the Contractor and his subcontractors engaged in the performance of this contract are employed, notices furnished by the Board, in relation to prevailing wages and supplements, minimum wages and other stipulations contained in Section 343-9.0 of the Administrative Code of the City of New York, and the Contractor and his subcontractors shall continue to keep such notices posted in such prominent and conspicuous places until final acceptance of the supplies, materials, equipment, or work, labor or services required to be furnished or rendered under this contract.

3. The contractor and his subcontractors shall keep such employment records as are required in the Rules and Regulations of the Board of Estimate of the City of New York adopted pursuant to the provisions of Section 343-9.0 of the Administrative Code.

4. In all orders or contracts by the contractor to the subcontractor for: (a) manufacturing or furnishing any of the supplies, materials or equipment under the contract; (b) furnishing any of the work, labor or services required under the contract, the contractor shall insert a notice to the subcontractor to the effect that such supplies, materials, equipment or work, labor or services are for the Board of Education and that the subcontractor is subject to the provisions of Section 343-9.0 of the New York City Administrative Code.

5. At the time the contractor makes application for each partial payment and for final payment, the contractor shall submit to the Executive Director a written certification of compliance with the prevailing wage, minimum wage and other provisions and stipulations required by Section 220 of the New York State Labor Law and Section 343-9.0 of the Administrative Code of the City of New York and the Rules and Regulations of the Board of Estimate adopted pursuant thereto and any and all supplements and amendments to such rules and regulations. Compliance with the provisions of this paragraph shall be a condition precedent to payment, and no payment shall be made to the contractor unless and until each such certification shall have been submitted to and received by the Executive Director.

6. The contractors attention is called to Section 222 which provides that preference shall be given to citizens of the State of New York who have been residents for at least six consecutive months immediately prior to the commencement of their employment.

Section 222 also provides that each contractor and sub-contractor performing public works shall keep a list of his employees, stating whether they are citizens of the State of New York, native born citizens or naturalized citizens and in case of naturalization, the date thereof and the name of the court in which granted.

7. This contract is executed by the contractor with the express warranty and representation that the contractor is not disqualified under the provisions of Section 343-9.0 of the Administrative Code for the award of contract.

8. Any breach or violation of any of the foregoing shall be deemed a breach or violation of a material provision of this contract, and ground for cancellation thereof by the Board.

Discrimination
prohibited.

Art. 64. 1. Policy

It is the policy of the Board of Education in accordance with the Labor Law of the State of New York and other applicable laws to provide equal opportunity in employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color or national origin and to promote the full realization of equal employment opportunity through an affirmative, continuing program of compliance by all contractors doing business with the Board of Education and their sub-contractors.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
C.D.R. ENTERPRISES LTD.,

Plaintiff,

:

: JUDGE MAC MAHON

-against-

:

74 Civil 5397

HARRISON J. GOLDIN, individually, and
as Comptroller of the City of New York,

:

: AFFIDAVIT

Defendant.

----- x

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.

MORRIS WEISSBERG being duly sworn, deposes and says: I am the attorney for the plaintiff in this action. I make this affidavit in opposition to defendant's motion to dismiss the complaint, and in reply to certain statements in an affidavit by Benedict P. Santeramo, which defendant submitted on December 13, 1974, in opposition to plaintiff's motion to convene a three-judge court to decide plaintiff's challenge to the constitutionality of section 220-b(2) of the New York Labor Law, and for an injunction against enforcement of that statute, which authorizes a "fiscal officer" to make a pre-judgment seizure of money earned by a contractor upon a public work contract.

Upon such prior motion, which has not yet been decided, plaintiff had no opportunity to reply to Mr. Santeramo's affidavit, which was not served until the oral argument of such prior motion on December 13, 1974.

On November 7, 1974, the defendant, by Mr. Babbush, his employee, issued a "Stop Payment Order", which directed that \$10,207.39 shall be withheld from money earned by plaintiff on public contract work; and that such money shall be withheld

"pending a final determination" of defendant's allegations that plaintiff failed to pay the full prevailing rate of wages to its employees on public work contracts with departments and agencies of the City of New York (Complaint, Exhibit 3).

Thereafter the defendant, by Mr. Babbush whom he designated as hearing officer, held hearings on such allegations on November 13, 1974; December 3, 1974; and December 6, 1974.

As alleged in the complaint (par. 14), at the end of the hearing session on December 6, 1974, Mr. Babbush canceled a hearing session which was previously scheduled for December 13, 1974, and he adjourned the hearings without date.

I was plaintiff's attorney who represented plaintiff at the hearings on the aforesaid dates. Contrary to the statements in paragraph 10 of Mr. Santeramo's affidavit, on plaintiff's behalf I did not refuse to produce plaintiff's records at the hearing on December 6, 1974; and plaintiff did not refuse to produce its records in defendant's office on prior occasions. Mr. Santeramo himself said in his affidavit (par. 5):

"A payroll book was received in the Office
on September 12, 1974."

Moreover, Mr. Santeramo's affidavit did not deny the allegation in the complaint (par. 7) that on October 31, 1974, plaintiff brought its records to a hearing session scheduled for that day, which the defendant adjourned without notifying plaintiff of such adjournment.

At the hearing session on December 6, 1974, on plaintiff's behalf, I offered to present plaintiff's records in evidence, and

that plaintiff's secretary, Charles D'Aleo, then and there present, shall testify about his knowledge of entries in such records and be available for cross-examination.

Mr. Babbush, the hearing officer, and Mr. Schwerin, a City government lawyer who was prosecuting defendant's allegations against plaintiff, demanded that the plaintiff shall give to Mr. Babbush and to Mr. Santeramo possession of plaintiff's records, and that the plaintiff shall allow them to make photocopies of plaintiff's records. Mr. D'Aleo refused that demand.

I submit that, as a matter of law, Messrs. Babbush and Santeramo, and the defendant, had no legal right to take possession of plaintiff's records, or to photocopy them, against plaintiff's will; and I so advised Mr. D'Aleo.

In retaliation for plaintiff's refusal to give to Messrs. Babbush and Santeramo possession of plaintiff's records, and permission to photocopy them, Mr. Babbush canceled the hearing session which was previously scheduled for December 13, 1974, and he adjourned the hearings without date. Mr. Babbush told Mr. Schwerin, the City's lawyer, to make application to punish the plaintiff for contempt of court. However, to serve his own purposes, Mr. Babbush and Mr. Santeramo made no mention of threatened contempt proceedings in Mr. Santeramo's affidavit of December, 1974; and no contempt proceedings were commenced.

Mr. Babbush also sent me a mailgram on December 11, 1974, the day after the papers in this lawsuit were served, in which Mr. Babbush canceled the hearing session scheduled for December 13, 1974 (Santeramo affidavit, Exhibit B):

" *** pending the outcome of the Corporation Counsel's
action to secure the material in possession of your
client in violation of my order."

No proceedings were commenced by the Corporation Counsel
to compel plaintiff to give to defendant possession of plaintiff's
records, or permission to photocopy such records.

Defendant's adjournment of the hearings without date on
December 6, 1974, and the non-resumption of such hearings to date,
has continued defendant's pre-judgment seizure of \$10,207.39
of plaintiff's money earned by public contract work, which seizure
was made on November 7, 1974, without any determination of defen-
dant's allegations that plaintiff failed to pay the prevailing
rate of wages to its workers.

Plaintiff continues to be willing to present its records in
evidence, as I said at the hearing on December 6, 1974; and
plaintiff's secretary, Charles D'Aleo, continues to be willing to
testify at a hearing about his knowledge of entries in plaintiff's
records. Plaintiff has not been able to do this since December
6, 1974, when defendant arbitrarily, illegally, and
unconstitutionally adjourned the hearings without date; and he
has not shown any indication when or under what conditions he
will resume such hearings.

Meantime, plaintiff's \$10,207.39 continues to be seized
by defendant's unconstitutional pre-judgment seizure thereof.

Sworn to before me this
13th day of January 1975

Morris Weissberg
MORRIS WEISSBERG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C.D.R. ENTERPRISES LTD.,

Plaintiff

JUDGE MAC MAHON

-against-

HARRISON J. GOLDIN, individually, and as:
Comptroller of the City of New York,

Defendant.

74 Civil 5397

OFFICE OF CORPORATION CLERK

75 JAN 29 PM 4:13

CITY OF NEW YORK

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss

MORRIS WEISSBERG being duly sworn, deposes and says: I am the attorney for the plaintiff herein. I make this affidavit in support of plaintiff's motion for a preliminary injunction and for other relief, and in opposition to defendant's motion to dismiss the complaint.

Supplementing my prior affidavit herein, I submit herewith, as Exhibit 1, a photocopy of a REVISION OF STOP PAYMENT ORDER, dated January 3, 1975, issued by defendant, by his employee, Howard E. Babbush, whereby the amount of money subjected to pre-judgment seizure by defendant was increased from \$10,207.39, seized by his STOP PAYMENT ORDER dated November 7, 1974 (Complaint, Exhibit 3) to \$14,809.09, an increase of \$4,601.70. Such revised STOP PAYMENT ORDER, dated January 3, 1975, stated no reason for such increase of \$4,601.70 in the amount of plaintiff's money seized by such pre-judgment seizure by defendant.

Defendant has continued his suspension of the hearing which he made on December 6, 1974, when he arbitrarily, illegally, and unconstitutionally suspended the hearing without date. Meantime

defendant's prejudgment seizure of \$10,207.39 of plaintiff's money,
made on November 7, 1974, increased to \$14,809.09 on January 3,
1975, continues in effect, with no relief in sight for plaintiff.

Morris Weissberg
MORRIS WEISSBERG

Sworn to before me this
29th day of January 1975

JOHN J. KNEGEL
Notary Public, State of New York
No. 211120
Queens County
March 30, 1975

EXHIBIT 1 annexed to second affidavit of
Morris Weissberg read in support of
plaintiff's motion. THE CITY OF NEW YORK

OFFICE OF THE COMPTROLLER

To: Mr. Jerry R. Masi, Chief
Bureau of Audit

Jan. 3, 1975 19

FROM: Mr. Howard E. Babbush
Assistant to Comptroller

SUBJECT: Revision of Stop Payment Order dated
Nov. 7, 1974. Contractor: C.D.R. ~~ENTERPRISES~~ LTD.

Please increase previously ordered Stop Payment
from \$10,207.39 to \$14,809.09.

Your office will be advised of final deter-
mination pursuant to Section 220 of New York State
Labor Law.

H. E. Babbush
Howard E. Babbush
Assistant to Comptroller

JAMES SCHWERIN, being duly sworn, deposes and says:

1. I am an Assistant in the office of W. Bernard Richland, Corporation Counsel, and have been assigned to handle the administrative proceeding against C.D.R. Enterprises, Ltd. and others for alleged violations of Section 220 et seq. of the New York Labor Law. This matter is presently pending before hearing officer Howard Babbush, Esq.

2. I make this affidavit in opposition to plaintiff's motion for a preliminary injunction and in support of defendant's motion to dismiss. It is intended to supplement the affidavit of Benedict P. Santeramo, dated December 13, 1974, and to fully apprise the court of the relevant administrative proceedings of December 6, 1974 and subsequent events.

3. At the December 6 hearing. C.D.R. refused to permit photocopying of certain of its books, although there had been a prior subpoena duces tecum issued and the hearing officer had directed that C.D.R. permit the photocopying. C.D.R. took the position that it had complied with the subpoena by bringing the records to the hearing. The hearing officer directed that I move in Supreme Court on the following Monday morning for contempt. It was subsequently determined, however, that a proceeding to compel compliance with the subpoena would be more appropriate. A copy of the relevant portions of the December 6 transcript is attached hereto as Exhibit 1.

4. Unfortunately, due to a heavy caseload of my own and the recent reduction in personnel, as well as the holidays, papers were not filed in the Supreme Court until Friday January

AFFIDAVIT OF JAMES SCHWERIN, READ IN OPPOSITION
TO PLAINTIFF'S MOTION

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10, 1975 and not served until Monday January 13. The proceeding was placed on the calendar for January 20,

5. Mr. Weissberg's office requested that it be adjourned until January 29. Upon my arrival in court on that date, Mr. Weissberg served me with his opposition papers. His papers raised for the first time the argument that the subpoena had not been properly served and I was forced to request an adjournment to consider the question. The hearing is now scheduled for February 7, 1975.

JAMES SCHWERIN
JAMES SCHWERIN

Sworn to before me this
31 day of January 1975

Iannelli

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all of the testimony of the witness on redirect
on the ground that they are conclusions and not
supported by any records. Apparently based on
I can't tell what.

THE HEARING OFFICER: Denied.

MR. WEISSBERG: Exception. I have
no more questions.

THE HEARING OFFICER: I thank you,
Mr. Iannelli.

(Witness excused.)

THE HEARING OFFICER: Mr. Schwerin.

MR. SCHWERIN: Mr. Deleo has been
looking at what looks like a looseleaf book, which
I take it to contain records of C.D.R. to check
the testimony of Mr. Iannelli.

Are these records that were provided
to the controller's office?

MR. WEISSBERG: I will find out. We
are going to have him testify. He's in a hurry
to get out.

THE HEARING OFFICER: Mr. Weissberg,
how long is this testimony going to run?

MR. WEISSBERG: Less than twenty
minutes.

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THE HEARING OFFICER: We are not going to be able to conclude with both his direct examination and his cross-examination today.

MR. WEISSBERG: I see.

THE HEARING OFFICER: I would suggest that I don't think the hearing is going to conclude next week since this is part of your defense anyway, he will probably go on on the following session since the government probably needs time.

MR. WEISSBERG: As you know, we can't be here.

THE HEARING OFFICER: We will allow additional time or an additional date, on the next try, for Mr. Deleo to testify.

MR. WEISSBERG: Is that the end of it then?

MR. SCHWERIN: I would like to know if those are the records that have been supplied to the controller?

MR. WEISSBERG: I'm going to answer you as follows:

He will be a witness and he will testify.

THE HEARING OFFICER: There was a sub-

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2 poena issued. I issued the subpoena duces tecum
3 for all books and records.

4 I want to know if those books and
5 records were given to the comptroller?

6 MR. WEISSBERG: I don't know the
7 answer.

8 THE HEARING OFFICER: Will you please
9 ask your client.

10 MR. WEISSBERG: I'm going to answer
11 you also as follows: This is based on a recent
12 court decision, when records are subpoenaed --
13 do we need this on the record?

14 THE HEARING OFFICER: Yes.

15 MR. WEISSBERG: On the record.

16 When records are subpoenaed, the
17 owner of the records -- C.D.R. contends as
18 follows -- the records are the property of C.D.R.
19 They will be produced at a hearing pursuant to
20 subpoena. They will not be left. At the hearing
21 they will be produced, and testimony --

22 THE HEARING OFFICER: What case are
23 you citing?

24 MR. WEISSBERG: Citing the case -- re-
25 cent case on the subject, if I can find it.

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2 THE HEARING OFFICER: Do you have a
3 copy of the subpoena duces tecum that was issued?

4 MR. WEISSBERG: Can we have a recess
5 for a minute? We will be right back. Our posi-
6 tion is that we will comply with the subpoena by
7 producing the books. We will not leave them, we
8 will not consent to photocopies of our books being
9 made.

10 THE HEARING OFFICER: I have a sub-
11 poena in front of me which states that you are
12 hereby subpoenaed to appear and attend before
13 the Comptroller of the City of New York, Division
14 of Labor Law, in Room 631, Municipal Building,
15 Borough of Manhattan, City of New York, on the
16 8th day of November 1974, at 10:00 o'clock in
17 the forenoon, and it goes on.

18 Why weren't those books produced on
19 that date, November 8th?

20 I'm speaking to your attorney.

21 MR. WEISSBERG: Well, I don't know --
22 this is not a contempt proceeding. But we are
23 perfectly -- the difficulty, as I was informed,
24 is as follows:

25 The employees of the Comptroller

asked that the books be left and that they be
allowed to be photocopied.

On the advice of counsel, C.D.R.
declined to leave the books, declined to con-
sent to have them photocopied.

However, we are perfectly willing to
produce them for use as evidence and for examina-
tion at a hearing which is all that the subpoena
requires.

THE HEARING OFFICER: Mr. Schwerin,
did they ask to leave the books -- did they say
they were --

MR. SCHWERIN: There were certain
books brought in that photocopies were supplied.
Clearly from the size of that book, the complete
records were not left or allowed to be photo-
copied in that time.

We do not have them at this time.
We have photocopies of a certain few pages of
records.

MR. WEISSBERG: Actually I was not
the attorney at that time. But now that I am my
advice is clear, we will not allow anything to be
photocopied.

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2 THE HEARING OFFICER: I'm directing
3 they be left here.

4 MR. WEISSBERG: We will not comply.

5 THE HEARING OFFICER: Mr. Schwerin.

6 MR. SCHWERIN: I ask he be held in
7 contempt.

8 THE HEARING OFFICER: I ask you to
9 please move this coming Monday in Supreme Court
10 on a contempt proceeding.

11 Mr. Weissberg, I hope you appreciate
12 the seriousness of this?

13 MR. WEISSBERG: I appreciate it. It's
14 a constitutional question. As I understand the
15 law to be, a subpoena does not take ownership or
16 possession away from the owner with respect to
17 records.

18 THE HEARING OFFICER: While the records
19 are here now I will -- I will direct that Mr.
20 Schwerin go over the books and records at this
21 time and make photostatic copies if you refuse to leave
22 them.

23 MR. WEISSBERG: We decline. We do not
24 contend that making photocopies --

25 THE HEARING OFFICER: Mr. Schwerin.

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2 MR. SCHWERIN: I can only say Monday
3 I will add that to the contempt proceeding.

4 THE HEARING OFFICER: All right.

5 MR. WEISSBERG: Also I wish to point
6 out that Mr. Deleo suggested to me that Mr. Iannelli
7 has not produced his original books of account.

8 THE HEARING OFFICER: Mr. Weissberg,
9 Mr. Iannelli testified that these cards are the
10 originals; from these cards his books and records
11 were made.

12 MR. WEISSBERG: Even so they should
13 be here.

14 MR. FEINSTEIN: We would have no ob-
15 jection at any time to produce our records. The
16 Comptroller examined our records quite thoroughly.
17 We gave the controller photocopies of all our
18 records that were requested.

19 MR. WEISSBERG: This is just another
20 one of these squeeze plays where the Comptroller
21 is using his governmental powers to squeeze out
22 contractors who do not have collective bargaining
23 contracts with the painting union.

24 THE HEARING OFFICER: I hope you have
25 a substantial basis for this because I intend to

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2 take action on that statement as well.

3 MR. WEISSBERG: There's a judgment
4 in the Federal District Court in the Eastern
5 District of New York against the Painters Union
6 for damages for harassing this contractor.

7 THE HEARING OFFICER: I do not see how
8 this is in any way relevant to my sitting here
9 as a Hearing Officer and this proceeding.

10 If that's your final position then --

11 MR. WEISSBERG: Why is the union
12 here?

13 THE HEARING OFFICER: This is a pub-
14 lic hearing. Anyone has the right to attend this
15 hearing.

16 MR. WEISSBERG: But the union has been
17 here right along. This is the third --

18 THE HEARING OFFICER: This is a public
19 hearing. Anyone who wishes to sit in, anyone who
20 walks in may sit in at a hearing.

21 MR. WEISSBERG: It was the union --

22 THE HEARING OFFICER: There is no ques-
23 tion. This is not in any way relevant to this pro-
24 ceeding. And if that's your final word on the
25 books, the corporation counsel will then proceed

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on Monday.

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MR. WEISSBERG: Let them proceed,

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then.

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THE HEARING OFFICER: The hearing is

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concluded for this date.

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I hereby certify that the foregoing

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is a true and accurate transcription

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of the within proceedings.

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SECOND AFFIDAVIT OF JAMES SCHWERIN, READ IN
OPPOSITION TO PLAINTIFF'S MOTION

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JAMES SCHWERIN, being duly sworn, deposes and says:

1. I am an Assistant in the office of W. BERNARD RICHLAND, Corporation Counsel, and have been assigned to handle the administrative proceeding against the C.D.R. Enterprises, Ltd. and others for alleged violations of Section 220 et seq. of the New York Labor Law. This matter is presently pending before Hearing Officer Howard Babbush, Esq.

2. I make this affidavit in opposition to plaintiff's motion for a preliminary injunction and in support of defendant's motion to dismiss. It is intended to supplement my affidavit, dated January 31, 1975.

3. As I indicated in my January 31 affidavit, I first became aware on January 29 that the application to compel compliance with the subpoena might involve questions regarding the adequacy of service. After an investigation of the factual circumstances surrounding service, it was determined that the application would be withdrawn.

4. A new subpoena has been served upon Mr. Charles D'Aleo and Mr. Weissberg, the attorney for C.D.R. Enterprises, Ltd. has been notified that the hearing will continue on March 4, 1975. It is anticipated that only one or two more days will be required to complete the testimony.

JAMES SCHWERIN
JAMES SCHWERIN

Sworn to before me this
19th day of February 1975

THIRD AFFIDAVIT OF MORRIS WEISSBERG, read in support
of plaintiff's motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
C.D.P. ENTERPRISES LTD., : JUDGE MAC MAHON
Plaintiff, : 74 Civil 5397
-against- :
HARRISON J. GOLDEN, individually, and as:
Comptroller of the City of New York, :
Defendant. : AFFIDAVIT
----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss MORRIS WEISSBERG being duly sworn, says: I am
the attorney for the plaintiff herein.

Defendant submitted an affidavit by James Schwerin, an Assistant
Corporation Counsel of the City of New York, sworn to on January 31,
1975, in which Mr. Schwerin said that on December 6, 1974, defendant's
hearing officer, Howard E. Babbush, adjourned an administrative
hearing whether plaintiff paid the prevailing rate of wages to workers
whom it employed on a public work contract for painting work with the
Board of Education of the City of New York, pending a motion by defen-
dant to compel plaintiff to comply with a subpoena duces tecum by
giving to defendant possession of plaintiff's payroll records or
photocopies thereof. Mr. Schwerin submitted an extract from the
minutes of the hearing of December 6, 1974, which shows that plaintiff's
records were physically present in the hearing room with Charles
D'Aleo, plaintiff's secretary; that plaintiff offered to produce its
records at the hearing; that such records shall be offered in evidence;
and that Mr. D'Aleo shall testify about his knowledge of entries in
such records, and submit to cross-examination. The minutes show that
Mr. Babbush, the hearing officer, and Mr. Schwerin, the lawyer, refused
the above offer, and, instead, they demanded that plaintiff shall give
defendant possession of plaintiff's records, or photocopies thereof.
on my advice, plaintiff declined to do so.

THIRD AFFIDAVIT OF MORRIS WEISSBERG, read in support
of plaintiff's motion

On January 31, 1975, plaintiff served upon Mr. Schwerin plaintiff's memorandum of law, which cited and quoted from cases which held that a subpoena duces tecum requiring production of records does not give to the government lawyer who issued such subpoena any right to inspect such records, to seize and take possession of such records, or to make photocopies thereof. Golbard v. United States, 408 U.S. 41; Hale v. Weinkel, 201 U.S. 43; In re Grand Jury Proceedings, 486 P. 2d 85 (C.A. 3, 1973); Saratoga Harness Racing Association v. Monaghan, 9 Misc.2d 868, 872, 169 N.Y.S.2d 520, 524; Cataldo v. County of Monroe, 38 Misc. 38 Misc. 2d 768, 238 N.Y.S.2d 855, affd. 19 A.D.2d 852; People v. Coleman, 75 Misc. 2d 1090, 349 N.Y.S.2d 298; Matter of Beatty, 33 Misc. 2d 1096, 228 N.Y.S.2d 955, reversed on other grounds, 16 A.D.2d 1021, 230 N.Y.S.2d 869, affd. 12 N.Y.2d 695; Amalgamated Union, Local 224 v. Levine, 219 N.Y.S.2d 851.

On January 31, 1975, Mr. Schwerin requested and obtained an adjournment of his motion to February 7, 1975. Presumably he reconsidered his position, because on February 7, 1975, Mr. Schwerin withdrew defendant's motion to compel plaintiff to give defendant possession of plaintiff's payroll records, or photocopies thereof.

More than three months have now gone by since November 7, 1974, when defendant made a pre-judgment seizure of \$10,207.39 of money due to plaintiff as progress payments for completed work on its aforesaid public work contract.

More than one month has now gone by since January 3, 1975, when the defendant increased from \$10,207.39 to \$14,809.09, his pre-judgment seizure of plaintiff's money due upon the said public work contract.

More than two months have now gone by since December 6, 1974, when the defendant adjourned the said hearing without date, upon the

THIRD AFFIDAVIT OF MORRIS WEISSBERG, read in support
of plaintiff's motion

aforesaid ground, which he has now withdrawn. There is no indication by defendant when, if ever, the hearing will be resumed and completed, and a decision will be made about the \$14,809.09 of plaintiff's contract money which the defendant continues to hold by his unconstitutional pre-judgment seizure thereof.

Morris Weissberg
MORRIS WEISSBERG

Sworn to before me this
10th day of February 1975

ROBERT J. KRENGEL
Notary Public, State of New York
No. 24 1201120
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES COURT OF APPEALS
for the Second Circuit

C.D.R. ENTERPRISES LTD.,

Plaintiff-Appellant,

- against -

MARRISON J. GOLDIN, etc.,

Defendant-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, James Steele,

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York

That on the 15th day of May 1975 at Municipal Bldg, N.Y. N.Y.

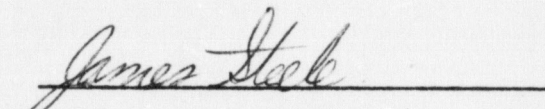
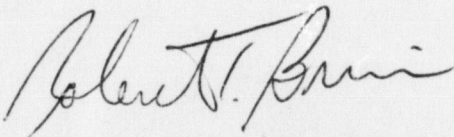
deponent served the annexed *Appendix*

upon

W. Bernard Richland

the Attorney in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 15th
day of May 19 75


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977